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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 718

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL, *Appellants*,

v.

HARRISON MANN, ET AL, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA

MOTION OF APPELLEES MANN, STONE, WEBB AND DONOVAN TO DISMISS OR AFFIRM

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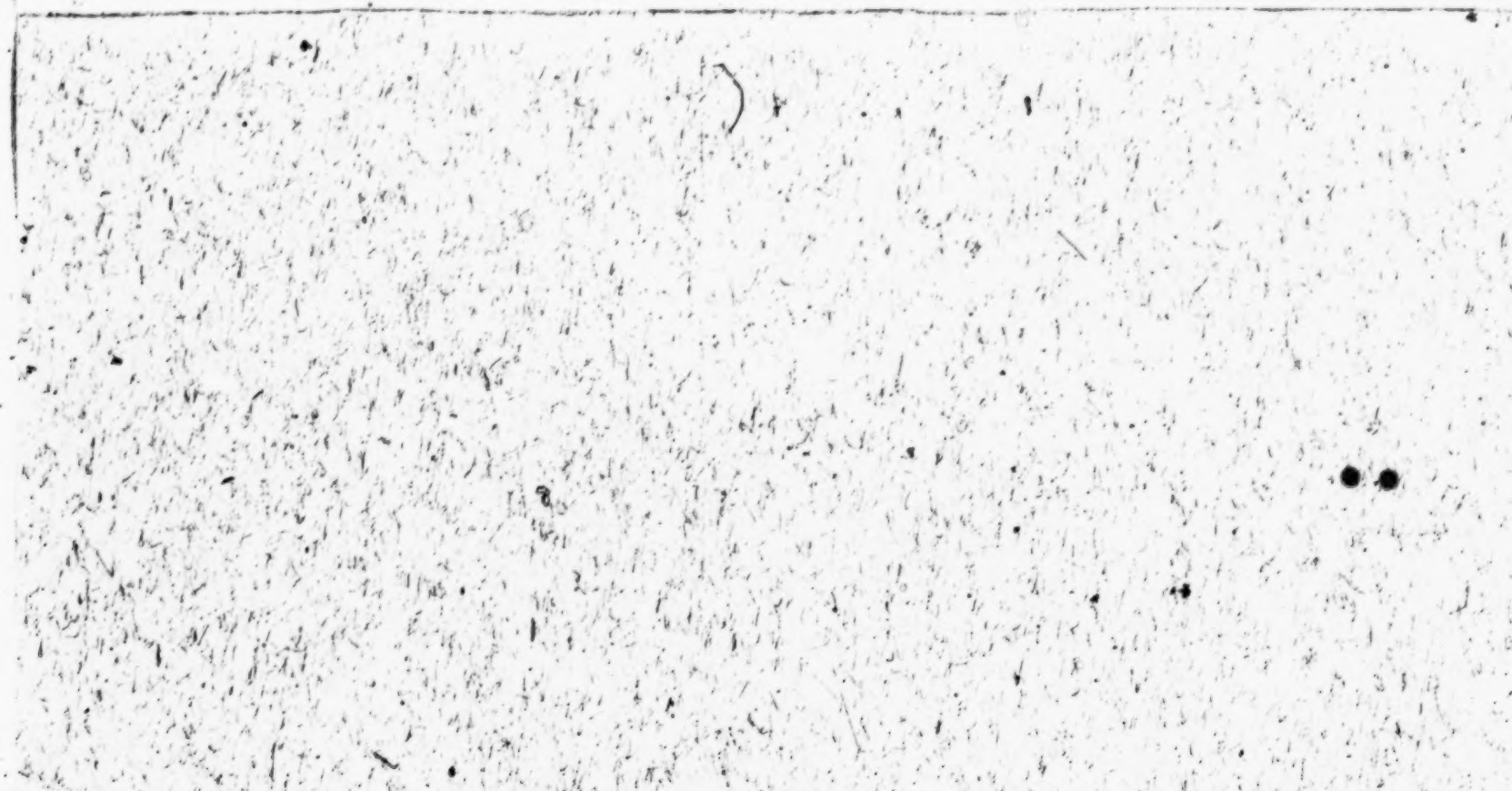

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Appellees Harrison Mann, Kathryn Stone, John C. Webb and John A. K. Donovan move the Court to dismiss this appeal on the ground that the order complained of was not one granting or denying an interlocutory or permanent injunction and therefore is not appealable to this Court under 62 Stat. 926, 28 USC 1253.

The said appellees also move, in the alternative, to affirm on the ground that the question presented by this appeal is so unsubstantial as not to need further argument.

Statement

This appeal is the second one in this case. It seeks to challenge portions of an order entered on September 18, 1964, by a District Court of three judges upon the mandate of this Court in *Davis* v. *Mann*, 377 U.S. 678.

The facts involved and the proceedings had prior to this Court's decision just cited, are fully set forth in this Court's opinion in that case. In its decision this Court affirmed an interlocutory injunction order entered by the District Court on November 28, 1962, which had declared Virginia's legislative apportionment statutes violative of the Fourteenth Amendment to the Federal Constitution and which enjoined any further elections thereunder (*Davis* v. *Mann*, 377 U.S. 678, 693).

Because of a stay of the District Court's original injunction, granted by the Chief Justice during the pendency of the first appeal, the November 1963 election of members of both houses of the Virginia legislature was actually held under the statutes which this Court subsequently declared unconstitutional; and the new legislature has been acting *de facto* ever since its members thus elected assumed their seats in January 1964. If the election had been a constitutionally valid one, the members of the House of Delegates thus chosen would continue in office until the second Wednesday in January 1966 while state Senators would continue in office until January 1968.

In affirming the District Court's original injunction order this Court said:

> "We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time. Since the next election of Virginia lgislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reappor-

tionment scheme for purposes of that election. After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. Since the District Court stated that it was retaining jurisdiction and that plaintiffs could seek further appropriate relief, the court below presumably intends to take further action should the Virginia Legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan. We therefore affirm the judgment of the District Court on the merits of this litigation, and remand the case for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*." *Davis* v. *Mann*, 377 U.S. at 692-693.

On September 18, 1964 the District Court entered its order on the mandate of this Court (Jurisdictional Statement, App. 4). In that order the District Court (a) reaffirmed its original injunction order of November 28, 1962, which had declared unconstitutional the Virginia statutes under which the 1963 election had been held; (b) gave "provisional vitality" to the legislature chosen under the "condemned statute" by declaring that such legislature could enact constitutionally valid reapportionment statutes and then transact ordinary business until after the election scheduled to be held in November 1965; (c) again stayed the effective date of the court's original injunction until December 15, 1964, to give time for the legislature to enact new reapportionment statutes; and (d) stayed (in effect) the application of the injunction to state senators elected

under the condemned statute until the second Wednesday in January, 1966.

Appellants by their appeal have asserted that the District Court's order required "that the terms of the present members of the Senate of Virginia be reduced from four years to two years, contrary to the provisions of the Constitution of Virginia" (Statement of Jurisdiction p. 3).

Appellants, on October 16, 1964, applied to the Chief Justice for a stay of said order pending this appeal. On October 28, 1964, the Chief Justice denied the application.

On December 2, 1964, at a special session called by the Governor of Viginia the *de facto* General Assembly enacted amended reapportionment statutes for the distribution and apportionment of members of the House of Delegates and of the Senate of the state. Copies of these amended statutes (Va. Code Sec. 24-12 and Sec. 24-14) which were approved December 2, 1964, are set forth in the appendix hereto.[1]

At the same special session, the General Assembly enacted a new statute (Sec. 24-13.1) making provision for a special election of state senators in the event of a final court adjudication that the terms of the present [*de facto*] state senators are to terminate in January, 1966. A copy of this statute is also set forth in the appendix hereto.

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[1] The new reapportionment statutes give to appellees and to all other voters in Arlington and Fairfax Counties and the city of Falls Church (in which appellees reside) substantially proportionate representation in the General Assembly of Virginia computed on the 1960 census of population.

ARGUMENT

I

Appellants have noted their appeal to this Court under the statute authorizing appeals from an order of a District Court of three judges granting or denying an injunction (62 Stat. 926, 28 USC 1253).

But the District Court's "Order on Mandate" here complained of did not grant or deny an injunction. The order insofar as pertinent to this appeal simply (a) reaffirmed an existing injunction already held valid by this Court in *Davis* v. *Mann*, 377 U.S. 678; and (b) granted an additional *stay* of the effectiveness of said injunction, insofar as it affected invalidly elected state senators, until the second Wednesday in January, 1966. There was no new injunction granted or denied by the District Court, and it is submitted that this appeal was improvidently taken. Unless therefore this Court should elect to consider on its own motion whether its mandate in *Davis* v. *Mann*, 377 U.S. 678, has been complied with,[2] it is submitted that the appeal should be dismissed for want of jurisdiction.

II

Appellees also urge that the District Court's "Order on Mandate" was clearly correct, and that it should be affirmed by this Court without further argument.

This Court in its original opinion in this case, 377 U.S. 678, 693, authorized the District Court "to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme." And as the District Court pointed out in its opinion accom-

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[2] See *Continental Insurance Co.* v. *U.S.*, 259 U.S. 156, 166.

panying the order on mandate, there could be no constitutional validity to the scheduled election in 1965 of the Virginia House of Delegates if the state Senate "is deliberately permitted to lag behind * * * in seeking fairness of representation." The District Court also pointed out that with respect to "equality of popular representation they [the two houses] are mutually complementary." See Opinion of District Court, Statement of Jurisdiction, App. 1-3. C.f. also *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673.

The District Court's "Order on Mandate" clearly recognizes the "equitable principles" which this Court has said should guide its actions. As was indicated by Judge Bryan in his opinion accompanying the order, the state government will be subject to less confusion if the new reapportionment statutes are made effective as to both houses of the legislature at the same time than would be the case if they were made effective at different times. The order does not make any "unreasonable or embarrassing demands on [the] state in adjusting to the court's decree." c.f. *Reynolds* v. *Sims*, 377 U.S. 533, 585. In fact the General Assembly of Virginia has already made the necessary adjustments since the entry of the District Court's order by enacting new reapportionment statutes and by making tentative provision for the necessary special election of state senators in 1965.

The Chief Justice has already declined to stay the District Court's order pending this appeal. If the District Court's order is promptly affirmed, procedures for the 1965 primary and general election of state Senators in the newly constituted districts can become operative immediately without the uncertainties which would be inherent in the delays that would normally result if this case is put on the calendar for argument.

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed, or in the alternative, that the order and judgment of the District Court should be affirmed.

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An Act to amend and reenact § 24-12, as amended, of the Code of Virginia, relating to apportionment of the members of the House of Delegates.

Approved December 2, 1964

Be it enacted by the General Assembly of Virginia:

1. That § 24-12, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-12. Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

*First.—*Chesapeake, two.*

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, *Botetourt*, Covington and Clifton Forge, one.

Seventh.—Amelia, *Lunenburg* and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, *four.*

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford, one.

Twelfth.—Bland, *Craig*, Giles, *Pulaski and Wythe*, *two.*

Thirteenth.—Danville and Pittsylvania, one.

Fourteenth.—Brunswick and *Dinwiddie*, one.

Fifteenth.—Buchanan, one.

Sixteenth.—Russell and Dickinson, one.

Seventeenth.—Roanoke City and Roanoke County, one.

Eighteenth.—Campbell, one.

Nineteenth.—Caroline, King George, Essex and King and Queen, one.

Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church, one.

Twenty-first.—*James City, *York and Williamsburg, one.

Twenty-second.—Charlotte, *Cumberland* and Prince Edward, one.

Twenty-third.—Chesterfield and Colonial Heights, **two.*

Twenty-fourth.—Clarke, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, **two.*

Twenty-seventh.—Fairfax *County* and cities of Fairfax and Falls Church, **six.*

Twenty-eighth.—Fauquier, *Warren* and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, *Louisa *and Powhatan*, one.

Thirtieth.—Franklin *County and Floyd*, one.

Thirty-first.—Gloucester, Mathews, *New Kent, Charles City* and Middlesex, one.

Thirty-second.—*Carroll*, Grayson and Galax, one.

Thirty-third.—Greensville, *Surry* and Sussex, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth.—Henrico, **and city of Richmond, eight*

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, **Southampton* and **city of Franklin*, one.

Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun *and Prince William*, **two.*

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth.—Nelson*, *Appomattox and Buckingham*, one.

**Forty-ninth.—Norfolk City, *seven.*

**Fiftieth.*—Page*, *Rockingham, Shenandoah and Harrisonburg*, one.

***Fifty-first.—Petersburg*, one.**
***Fifty-second.—Pittsylvania, *one.**
***Fifty-third.—Portsmouth, *three.**
***Fifty-fourth.—Prince George* and Hopewell, one.**
***Fifty-fifth.—*Virginia Beach, two.**
***Fifty-sixth.—Roanoke County, one.**
***Fifty-seventh.—Roanoke City, two.**
***Fifty-eighth.—Rockbridge, Bath and Buena Vista, one.**
***Fifty-ninth.—Rockingham and Harrisonburg, *one.**
***Sixtieth.—Smyth, one.**
***Sixty-first.—Spotsylvania, Stafford and Fredericksburg, one.**
***Sixty-second.—Tazewell, one.**
***Sixty-third.—Washington, Scott and Bristol, two.**

And the districts hereby created are hereby numbered one (1) to ***sixty-three (63)** inclusive.

The reference to a county or city in this section is to the area comprising such county or city as of January one, nineteen hundred sixty-five.

2. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decisions shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

An Act to amend the Code of Virginia by adding a section numbered 24-13.1 to provide for the election in nineteen hundred sixty-five of members of the Senate of Virginia for terms expiring in January nineteen hundred sixty-eight; and to provide how members of the Senate of Virginia shall be elected for terms commencing in January nineteen hundred sixty-eight and thereafter.

Approved December 12, 1964

Be it enacted by the General Assembly of Virginia:

That the Code of Virginia be amended by adding a section numbered 24-13.1 as follows:

§ 24-13.1 (a) Notwithstanding the provisions of § 24-13 of this Code, if the Attorney General of Virginia shall file with the Clerk of the Virginia State Senate a copy of an order of the Supreme Court of the United States, or other federal court, finally adjudicating that the terms of the incumbent members of the Senate of the General Assembly of Virginia terminate on or before the convening in January, nineteen hundred sixty-six, of the regular session of the General Assembly, the Governor shall issue a writ calling a special election to elect the several members of the State Senate. The writ shall set forth the date of the election. All other provisions of law relating to the conduct of special elections shall apply. At such special election the candidates for election to the several State Senatorial Districts, as such Districts are then legally constituted, receiving the highest number of votes, respectively, shall be declared elected, and shall, upon qualifying for office, constitute the Senate of the General Assembly. Provided, however, if the Attorney General of Virginia shall file the copy of the order hereinabove-mentioned with the Clerk of the Virginia State Senate on or before the fifteenth day of March, nineteen hundred sixty-five, the Governor, in his discretion, is authorized to issue the writ calling an election to elect the several members of the State Senate on the date of the general election in November, nineteen hundred sixty-five. In such event, except as herein modi-

fied, all other provisions of law providing for primaries or conventions to nominate persons as candidates, and for the election of members of the State Senate, shall apply. The persons so elected and qualifying shall hold office for a term of two years commencing on the second Wednesday in January succeeding their election and ending upon the convening in January, nineteen hundred sixty-eight, of the regular session of the General Assembly.

(b) Successors to the members of the State Senate elected for terms expiring in January, nineteen hundred sixty-eight, shall be elected in November, nineteen hundred sixty-seven, pursuant to the provisions of § 24-13 of the Code.

(c) This act shall expire as of January ten, nineteen hundred sixty-eight.

An Act to amend and reenact § 24-14, as amended, of the Code of Virginia, relating to State senatorial districts.

Approved December 12, 1964

Be it enacted by the General Assembly of Virginia:

1. That § 24-14, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 24-14. The State is hereby divided into **thirty-three* districts entitled to senators as follows:

First.—The counties of Accomack, Northampton, **Mathews, Gloucester and York*, one.

Second.—Norfolk city, **three.*

Third.—**The cities of Chesapeake, Portsmouth and Virginia Beach, three.*

Fourth.—The counties of Halifax, Charlotte, **Prince* Edward, *Lunenburg and Nottoway* and the city of South Boston, one.

Fifth.—The counties of Isle of Wight, Nansemond, Southampton and the cities of Suffolk and Franklin, one.

Sixth.—The counties of Greensville, *James City*, Prince George, Surry and Sussex, and the **cities* of Hopewell *and Williamsburg*, one.

Seventh.—The counties of Brunswick, *Dinwiddie and Mecklenburg, *and the city of Petersburg*, one.

Eighth.—The counties of **Arlington and Fairfax, and the cities of Fairfax and Falls Church*, one.

Ninth.—Arlington county, one.

**Tenth.*—The counties of Appomattox, Buckingham, *Amherst, Nelson and **Campbell*, one.

Eleventh.*—Bedford* County and city of Lynchburg, one.

**Twelfth.*—The counties of Henry, Patrick and Pittsylvania and the cities of Danville and Martinsville, two.

**Thirteenth.*—The counties of *Carroll, Floyd, **Franklin and Montgomery*, and the **cities* of Galax *and Radford*, one.

**Fourteenth.*—The counties of Washington, Lee and Scott and the city of Bristol, one.

**Fifteenth.*—The counties of Dickenson, *Russell* and Wise and the city of Norton, one.

**Sixteenth.*—The counties of Buchanan, **Smyth* and Tazewell, one.

**Seventeenth.*—The counties of Bland, Giles, Pulaski, *Craig, Grayson* and Wythe, one.

**Eighteenth.*—The counties of Alleghany, **Bath*, Botetourt,* and **Roanoke*, and the cities of *Clifton Forge and Covington, one.

**Nineteenth.*—The counties of Augusta, **Rockbridge* and Highland, and the cities of *Buena Vista*, Staunton and Waynesboro, one.

**Twentieth.*—The counties of Page, Rappahannock, Rockingham and Warren, and the city of Harrisonburg, one.

**Twenty-first.*—The counties of Clarke, Frederick, Shenandoah *and Loudoun* and the city of Winchester, one.

**Twenty-second.*—The counties of Albemarle, Fluvanna, Greene, *Cumberland, Powhatan* and Madison, and the city of Charlottesville, one.

**Twenty-third.*—The counties of Goochland, Louisa, Orange, *Spotsylvania, *Culpeper, Caroline, King George* and the city of Fredericksburg, one.

**Twenty-fourth.*—The county of Fairfax and the cities of Fairfax and Falls Church, two.

**Twenty-fifth.*—The counties of *Prince William, *Stafford and *Fauquier*, one.

**Twenty-sixth.*—The counties of *Hanover, King William, Essex, King and Queen, Middlesex; *Westmoreland, Northumberland, Richmond and Lancaster*, one.

**Twenty-seventh.*—City of Newport News*, one.

**Twenty-eighth.*—City of Hampton, one.

**Twenty-ninth.*—The counties of Charles City, Chesterfield, **Amelia* and New Kent and the **city* of Colonial Heights*, one.

**Thirtieth.*—Richmond city, two.

**Thirty-first.*—County of Henrico, one.

**Thirty-second.*—City of Roanoke, one.

**Thirty-third.*—City of Alexandria, one.

PROOF OF SERVICE

I, Edmund D. Campbell, one of the attorneys for Harrison Mann, Kathryn Stone, John C. Webb and John A. K. Donovan, appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several appellants hereto and and the remaining appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid

(a) to the following attorneys of record for appellants: Robert Y. Button, Esquire, and R. D. McIlwaine III, Esquire, Supreme Court-State Library Building, Richmond, Virginia, 23219; David J. Mays, Esquire, and Henry T. Wickham, Esquire, State-Planters Bank Building, Richmond, Virginia, 23219;

(b) to the following attorneys for remaining appellees: Henry E. Howell, Jr., Esquire, 808 Maritime Tower, Norfolk, Virginia, and Leonard B. Sachs, Esquire, Citizens Bank Building, Norfolk, Virginia.

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(3512-1)